

In the Compensation of
Douglas F. McCawley, Claimant

Contested Case No: 06-028H

PROPOSED & FINAL ORDER

June 2, 2006

DOUGLASS F. MCCAWLEY, Petitioner

SAIF CORPORATION, Respondent

Before Darren L. Otto, Administrative Law Judge, Workers' Compensation Board

A hearing was convened and concluded in the above entitled matter on May 17, 2006 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by his attorney Martin J. McKeown. The employer, Eugene Indian Center, and its insurer, SAIF Corporation, were represented by their attorney Thomas R. Nash. Exhibits 1 through 64 and 65, pgs. 1 & 2, were received into evidence. Exhibits 65-3 and 36A were not received into evidence.

ISSUES

Claimant challenges the Workers' Compensation Division's (WCD) January 13, 2006 Administrative Order which found eight proposed physical therapy visits after March 3, 2005 not appropriate and disallowed. The issue is whether the WCD's decision was based on substantial evidence in the record.

FINDINGS OF FACT

On July 21, 1978, [claimant] slipped on some stairs and injured his left shoulder. SAIF accepted the claim for left shoulder contusion, left shoulder post revision humeral arthroplasty, post prosthetic glenoid arthroplasty and post complex arthroplasty.

SAIF enrolled [claimant] in Providence on February 28, 1995.

Over time [claimant] received non-surgical and surgical treatment. Surgical treatment included seven procedures; the most recent was removal of the humeral component, canellous medullary canal allografting, insertion of a customized stem with subcapularis reconstruction and lysis of adhesions provided by Dr. Matsen on September 7, 2004. After each surgery [claimant] received PT.

After the September 7, 2004 surgery, physical therapy resumed at PPMC Rehabilitation at Plaza.

On October 15, 2004, [claimant] returned to Dr. Matsen for follow-up. On examination, Dr. Matsen noted that [claimant] could easily elevate to 104 degrees and 40 degrees of external rotation. Dr. Matsen also noted a well-healed incision. Dr. Matsen planned to advance [claimant's] rehabilitation and to consult with pain

management services to help [claimant] manage his chronic pain while his arm is healing.

On October 20, 2004, [claimant] began the first of 16 PT visits to be completed in 8 weeks. Craig Anderson, PT noted that the goal of an independent home exercise program was initiated and the goal of reaching around to the back to tuck in his shirt was not met.

On November 22, 2004, Dr. Matsen re-evaluated [claimant]. Dr. Matsen noted that [claimant] was taking less Talwin. Dr. Matsen increased [claimant's] rehabilitation to include 20 degrees of external rotation, 120 degrees of forward elevation, strengthening exercises and ultrasound.

Mr. Anderson re-evaluated [claimant] on December 4, 2004, and noted that he was 25% independent with his home exercise program, but was unable to tuck in his shirt in the back. Mr. Anderson noted a recent onset of left shoulder clicking. He opined that [claimant] was slowly making improvement.

Mr. Anderson noted in a PT progress summary that [claimant] met a range of motion limit of 120 flexion and 20 degrees external rotation actively and passively supine, but not against gravity. He further noted that [claimant] remained very weak and nonfunctional against gravity and would benefit from continued PT.

A January 7, 2005 PT re-evaluation noted that [claimant's] goal status was unchanged.

On February 1, 2005, Providence approved an additional 20 visits over 8 weeks.

Per the February 3, 2005 PT office visit, [claimant's] functional goal status was 50% met and on March 3, 2005 the goal of performing independent home exercises was 75% met. The goal of reaching back to tuck in his shirt is 50% met. [claimant] experienced increased shoulder clicking on active ROM.

Mr. Anderson recommended additional PT. On March 22, 2005, Providence disapproved the request for additional PT.

Dr. Matsen re-evaluated [claimant] on April 1, 2005. Based on improvement [claimant] attained so far, Dr. Matsen believed that [claimant] would benefit from additional PT and appealed the MCO's disapproval.

On May 10, 2005, Providence notified Dr. Matsen that after review, the original disapproval was upheld.

Dr. Matsen re-evaluated [claimant] on June 10, 2005. Dr. Matsen noted that [claimant] continued to demonstrate decreased shoulder function and the loss of

function decreased more because of lack of PT and a recent fall. Dr. Matsen noted fair muscle strength in all muscle groups and that x-rays showed the humeral component was solid at its shaft. He further noted that [claimant's] shoulder examination had not changed with respect to the weakness treated with PT.

On June 23, 2005, [claimant] requested administrative review.

On July 27, 2005, SABF responded that this dispute arose under the MCO dispute resolution.

In an August 9, 2005, MCO summary. Providence noted that two Providence MCO physician reviewers believed that [claimant] would not benefit from further supervised PT, as [claimant's] injury was not acute, he had received years of therapy, and was independent in home exercises. The reviewers reasoned that the anatomy of [claimant's] shoulder limited the maximum function that could be obtained.

At the request of the director, Eric Stowell, MD reviewed the medical record and relevant diagnostics. Dr. Stowell noted that [claimant] had multiple courses of extensive PT after each surgery and that his ROM improved to a point. Dr. Stowell reasoned that it was unrealistic that [claimant's] ROM would improve beyond what he achieved in the year since his last surgery. Dr. Stowell opined that because of the extensive prior therapy and instruction in a home exercise program, [claimant] should be very familiar with, and able to follow through on a home or gym exercise program. Dr. Stowell reasoned that a neurologic basis for the persistent weakness and reported atrophy should be considered as well as electro-diagnostic studies. Dr. Stowell opined that [claimant's] reduced strength and ROM, and persistent shoulder pain were chronic ongoing problems and would probably not improve with additional formal PT. Dr. Stowell further opined that the disputed PT is not appropriate nor would it impact functional outcome significantly. Dr. Stowell recommended two or three additional PT visits to set up and assess efficacy of a TENS unit trial and a two-three month health club membership to allow [claimant] to continue independent aquatic therapy and appropriate resistive exercises on an independent basis.

(Ex. 63, pgs. 1-3)

FINDINGS OF ULTIMATE FACT

Substantial evidence in the record established that claimant's proposed physical therapy was not medically necessary.

CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the WCD's Administrative Order was not based on substantial

evidence and should be reversed. SAIF asserts that there was ample evidence to support the Director's decision that claimant's physical therapy was not appropriate and the order should be approved.

OAR 436-001-0225, promulgated by the Workers' Compensation Division, prescribes the standard of review governing an ALJ's review on appeal of an MRU order in a proceeding under ORS 656.245:

(1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction *de novo*, unless otherwise provided by statute or administrative rule.

(2) In medical service and medical treatment disputes under ORS 656.245 *** the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record of if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

Under "substantial evidence" review, the reviewing tribunal "look[s] at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." Armstrong v. Asten-Hill Co., 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the 'any evidence' rule *** but it is also not *de novo* review." *Id.* (citation omitted); *see also* United Sates Bakery v. Shaw, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed by the MRU. Liberty Northwest Ins. Corp. v. Kraft, 205 Or App 59, 62-63 (2006).

The "substantial evidence" review does not mean that a factual finding must be affirmed if it is supported by *any* evidence, no matter how meager. The law requires more than that. It requires such evidence that "a reasonable mind would employ to support a conclusion." Ruiz v. Employment Division, 83 Or App 609 (1987) *citing* Cook v. Employment Division, 47 Or App 437, 441, *rev den* 290 Or 157 (1980); *see also* de St. German v. Employment Division, 74 Or App 484, 488 (1985). Substantial evidence "means more than 'any evidence,' a scintilla of evidence, or speculation." Cantrell v. Employment Division, 24 Or App 215, 217 (1976).

Following the July 21, 1978 industrial injury, claimant underwent seven surgical procedures to repair his injured left shoulder (Ex. 63-1). After each surgery, claimant received physical therapy. *Id.* From October 24, 2000 through March 14, 2005, claimant had no fewer than 125 physical therapy visits (Ex. 60-2). All of those visits were focused on claimant's left shoulder region including myofascial symptoms in the upper trapezius. *Id.* On March 3, 2005, claimant's attending physician, Dr. Matsen, prescribed another round of eight physical therapy visits (Ex. 56-1). The intended purpose of the proposed service was to improve claimant's left shoulder function. *Id.*

On March 22, 2005, Providence MCO notified claimant's physical therapist that the proposed service was not medically necessary and would not be approved (Ex. 43-1). The MCO

stated,

The records submitted were reviewed by our physician advisor. In the opinion of the reviewer, the objective findings indicate a plateau in patient progress. In the opinion of the reviewer, the claimant is performing P.T. independently at a pool program. As such, it is the opinion of the reviewer that documentation submitted did not establish the medical necessity of the additional therapy.

(Ex. 43-1).

Claimant disagreed with that notice of a lack of medical necessity (Ex. 44). On June 10, 2005, claimant's attending physician, Dr. Matsen responded to the notice of lack of medical necessity by stating that claimant had "continued to experience a diminution of his left shoulder function relevant to the fact that SAIF has not allowed him to reestablish his physical therapy." (Ex. 46-1). Nevertheless, Dr. Matsen conceded, on examination, claimant "still has fair strength in all muscle groups. His x-rays otherwise show that his humeral component is solid at its shaft and that his shoulder examination is not changed with respect to the weakness and we have been trying to treat with physical therapy." *Id.*

On August 5, 2005, Jackie Fowler, RN, and Linda Clear, RN, of Providence MCO Utilization Management explained their review process and the basis for their disapproval of claimant's proposed physical therapy to SAIF (Ex. 56). In essence, they concluded that Dr. Matsen did not establish with documentation that additional therapy would improve claimant's function (Ex. 56-11). It was also the determination of the two Providence MCO physician reviewers that no additional benefit would be afforded by further supervised physical therapy (Ex. 56-11). The basis for that opinion was that claimant's injury was not acute and he had received years of therapy and proficiency in home exercise programs. *Id.* Also, the anatomy of claimant's shoulder limited the maximum function that could be obtained. *Id.*

On December 15, 2005, Erik Stowell, M.D., performed a chart review report for the WCD's Medical Review Unit (MRU) (Ex. 60). Based on his review of the records, Dr. Stowell concluded that additional formal physical therapy was not appropriate nor would it impact significantly on claimant's functional outcome (Ex. 60-6). Specifically, he stated ,

[Claimant] ***has had multiple courses of extensive physical therapy following each of his shoulder surgeries since 2000. I agree with the previously stated observation that the goals for therapy have been similar in each case, specifically improving shoulder range of motion and strength and providing passive modalities to reduce pain. The injured worker's pain level has been reported as similar throughout the course of treatment. His range of motion has improved after each course of therapy to a point, but it appears unrealistic that he will have range of motion beyond what he has achieved in the 1+ year since his last surgery. It also my opinion that given the extensive prior therapy and instruction in a home exercise program, [claimant] should be very familiar with, and able to follow through on a home or gym exercise program.

(Ex. 60-6).

The MRU rejected claimant's request for additional physical therapy, relying on the medical opinions of the Providence MCO physician reviewers, the two nurses from Providence MCO, and Dr. Stowell. The MRU rejected Dr. Matsen's reasoning that physical therapy was required because claimant had lost ground when he did not receive it. The MRU stated,

***although Dr. Matsen believes that [claimant] lost ground Dr. Matsen noted that [claimant's] shoulder examination in regard to the weakness being treated with PT was unchanged. Since [claimant's] weakness was unchanged without PT, the director finds Providence's and Dr. Stowell's opinion most persuasive. Further, just as [claimant's] function would most likely not improve with further supervised PT, the record shows that [claimant's] weakness did not change without the PT. Therefore, based on the medical record, and Providence and Dr. Stowell's well-reasoned opinions, the director concludes that the disputed PT is not appropriate for [claimant].

(Ex. 63, pgs. 3-4).

Claimant contends that the MRU's decision was not based on substantial evidence but instead was based on pure speculation. That argument is not persuasive. The MRU's decision was based on the opinions of multiple nurses and physicians who reviewed claimant's medical history in great detail, including his history of 125 physical therapy visits, before arriving at their conclusion that further physical therapy was not appropriate. Those opinions were based on multiple factors, including (1) The objective findings indicated a plateau in patient progress, (2) Claimant was performing physical therapy independently at a pool program and with a home exercise plan, (3) The remaining anatomy of claimant's left shoulder was a barrier to achieve additional goals, (4) Claimant's injury was not acute and he had received years of therapy and proficiency in home exercise programs, (5) It was unrealistic to expect improved range of motion beyond what he had already achieved in the one and a half years since the last surgery. All of those factors constituted evidence that a "reasonable mind would employ to support a conclusion." Therefore, the MRU's Administrative Order finding claimant's additional physical therapy inappropriate was supported by substantial evidence in the record and will not be disturbed.

ORDER

IT IS HEREBY ORDERED that the January 13, 2006 Administrative Order is approved in its entirety.